

ILLINOIS POLLUTION CONTROL BOARD
January 21, 1988

MT. VERNON ASSOCIATION, INC.,)
)
 Petitioners,)
)
 v.) PCB 87-56
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter comes before the Board on a petition by the Mt. Vernon Association, Inc. (Association) for variance from a compliance schedule imposed by the Board in a November 21, 1985 enforcement Order (PCB 84-84) against the Mt. Vernon Water and Sewer Corporation (Corporation). The Association intends to purchase the public water supply system and wastewater treatment plant from the Corporation.

Amended petitions were filed on June 29, 1987 and October 1, 1987 in response to Board "more information" orders of May 14, 1987 and July 16, 1987 respectively. The Agency filed its Recommendation on October 22, 1987 in support of grant of variance with conditions. The Association waived its request for hearing on January 11, 1988 to facilitate the process and with the condition that the Association would be able to request a hearing were it to have a problem with the Board's action taken this day. The Board accordingly will decide this matter without hearing.

The petition involves only the wastewater treatment plant (WTP) as the water supply is in compliance. The facilities are located in Jo Davies County. The STP treats an average flow of 20,000 gallons per day from 108 households. The plant consists of only an inlet structure, a single cell lagoon and an outlet structure. There are no lift stations, as the sewage flows by gravity into the lagoon, where the retention time varies according to the flows. The unchlorinated effluent discharges to an unnamed tributary of the Mississippi River.

The Association asserts that the lagoon is non-aerated and of inadequate size (First Amend, pet. p. 3). The Agency asserts that the facilities have had a long history of extremely poor operation. (Agency Rec., p. 2) The present NPDES permit, which expires on December 1, 1989, contains effluent limits as

follows: BOD = 10 mg/1 monthly av.; TSS = 12 mg/1 monthly av.; fecal coliform not to exceed 400/100 ml daily max.; pH 6-9 and ammonia nitrogen 1.5/4.0 mg/1 when downstream ammonia nitrogen water quality limits are violated. On May 5, 1986 the Corporation was granted a lagoon exemption allowing 30/37 mg/1 BOD/TSS effluent limits once the facilities are upgraded. The Corporation Discharge Monitoring Reports between June, 86 and May, 87 show the following effluent ranges and overall averages.

	BOD (mg/1)	TSS mg/1	F. Coli (#/100 ml)	Ammonia-Nitrogen (mg/1)
range	43-182	8-51	20,000-1,400,000	12-65
average	93.3	27	-----	35.5

The Association also submitted a monthly lagoon effluent analysis by the City of Dubuque Waste Water Lab showing similar exceedances for 1985, 1986 and 1987 (through August) (2nd Amend. Pet. Ex. A)

Regarding the STP, the Board's Order in PCB 84-84 required the Corporation to comply with the following conditions:

1. The Corporation shall pay a \$1,500.00 penalty in three equal installments.
2. By August 30, 1985, submit a permit application to the Agency to dispose of sludge from the lagoon.
3. The Corporation shall construct a new lagoon cell and appurtenance (Phase I) in accordance with the following schedule:
 - A. Commence design by August 1, 1985.
 - B. File a permit application with the Agency by December 1, 1985.
 - C. File a rate case with the ICC by August 15, 1985.
 - D. File a lease approval application with the ICC by October 1, 1985.
 - E. Commence Phase I construction by May 1, 1986.
 - F. Complete Phase I construction by June 1, 1986.

4. Phase II (existing lagoon restructuring) is dependent upon actions by the ICC and IEPA, but is to start on August 1, 1989 and be completed by July 1, 1990.

The Agency asserts that, although the Corporation has complied with some of these conditions, including paying the penalty, the Corporation is in noncompliance with the enforcement order in some other respects. The permit application was filed over six months late and, most important, construction has not begun as required. The Corporation also filed three months late for its Illinois Commerce Commission (ICC) rate increase. On the other hand, the Corporation has spent \$50,000 for engineering fees and on the rate increase and has obtain its construction permit.

On October 1, 1986, the ICC granted sewer and water increases that would, for a family of 3.5 persons using 100 gal/cap., potentially increase their combined water and sewer bills from \$40.08/mo. to \$74.11/mo., an increase of about 185%. (Agency Rec., 4,5)

The Association, a non-profit corporation consisting of 90% of the property owners of the Mt. Vernon Subdivision, believes that it can, by combining Phase I and Phase II of the PCB 84-84 Order, come into full compliance faster than would have the Corporation, and at less overall costs. The Agency agrees (Agency Rec., p. 5). The Association also is seeking an FmHA loan. As of October, 1987, the Association had already pre-applied to the Farmers Home Administration (FmHA) and was proceeding to the application stage. The Association has had a "clear indication" that the loan will be approved upon completion of FmHA informational requirements and verification of purchase (2nd Amend. Pet., p. 2,3). The Association estimated that the average cost per customer would be reduced from \$62.79/monthly (\$95.00/mo. for seven years to pay for Phase II construction) to \$41.47/month. (2nd Amend. Pet. Ex. B) The purchase offer is contingent upon an extension of the PCB 84-84 construction timetable (2nd Amend. Pet. Ex. C, p. 4, Paragraph 11).

The proposed upgrading, presently Phase I, involves construction of a second lagoon cell, a rack filter and chlorination equipment. The existing lagoon, presently Phase II, would be completed concurrently with Phase I and involve dredging and restructuring.

Regarding environmental impact, the petition does not provide environmental detail, but asserts that accelerating final compliance will be environmentally beneficial (1st Amend. Pet. p. 4). The Agency asserts that, while it has no recent water quality data, based on the poor quality effluent data combined with the fact that the receiving stream is a zero low flow

stream, it may be assumed that the discharge is hardly benefiting the stream. The Agency has noted that as far back as 1973 there have been sludge deposits in the stream and, until upgrading, the situation will continue. The Agency also noted that the Board, in PCB 84-84, made findings of violation against the Corporation as to offensive discharges and unnatural sludge.

Regarding hardship, the Agency notes that the substantial rate increase required to finance system improvements is still hardly the highest in the State and that the affordability question was presumably part of the ICC review. The Agency notes that the FmHA staff in Princeton indicates that the upgrading would cost \$400,000 to \$500,000, assuming no improvements in the water system are needed. They expect the utility bills for water and sewage to be \$45-\$50/month, assuming FmHA assistance. The Agency also noted that the residents are currently paying the new higher rate with extra funds being escrowed for construction. Finally the Agency sees no federal law impediment. (Agency Rec. p. 6,7)

Board Discussion:

The Board believes that the hardship question must be viewed more broadly than the economic considerations discussed by the Agency. The Association is not, as is usual in a variance petition, requesting more time to come into compliance; it is proposing earlier completion dates. Rather, much of the Association's hardship is that it cannot, obviously, now comply with the now past dates contained in the Board's steps of progress ordered of the Corporation in PCB 84-84.

Denial of variance would essentially create an enforcement exposure that the Association cannot ex post facto remedy, and would frustrate its transfer of ownership. Additionally, this record indicates that the non-profit Association will be more likely than the Corporation to have the resources to pay for necessary construction and to operate the facilities properly at potentially less cost to the users. Under these circumstances, including the positive environmental considerations, the Board finds that the Association would suffer an arbitrary or unreasonable hardship were the transfer of ownership to be frustrated by denial of variance.

The Board agrees with the conditions proposed by the Agency and, with some timing adjustments, will order them. The Board notes that the Agency's October 22, 1987 recommended "steps of progress" dates precede this grant of variance. The Board will adjust forward the dates accordingly, and will lengthen the recommended final compliance date somewhat. The Board also notes that the Association has already complied with some of the steps, and may have completed others since October. Others appear to involve little time, such as the transfer of ownership and

permits. Since the record has provided less than clear guidance for these adjustments, the Board will consider any desired adjustments on a motion for reconsideration.

Finally, the Board will grant variance from the same provisions of the Act and Board regulation as that granted to the Corporation in PCB 84-84.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

Mt. Vernon Association, Inc. is granted a variance from 35 Ill. Adm. Code 309.102; 35 Ill. Adm. Code 304.120(c); 35 Ill. Adm. Code 304.104(a)(3); 35 Ill. Adm. Code 304.106; 35 Ill. Adm. Code 304.105 as it relates to 302.203; and 35 Ill. Adm. Code 312.101; Sections 12(a) and 12(f) of the Environmental Protection Act, subject to the following conditions:

1. Variance shall expire on July 1, 1990 or upon completion of the upgraded facilities whichever occurs first.
2. Petitioner shall comply with the following schedule to upgrade the sewage treatment facilities:
 - A. By February 15, 1988, Petitioner shall complete the purchase of the utility.
 - B. At the time of purchase, Petitioner shall have a properly certified operator under its employment to adequately operate and maintain the sewage treatment facilities.
 - C. By March 1, 1988, Petitioner shall apply to the Environmental Protection Agency to transfer construction and NPDES permits from Mt. Vernon Water and Sewer Corp. to itself.
 - D. By March 15, 1988, Petitioner shall complete and submit an preapplication for an FmHA loan to FmHA.
 - E. By July 1, 1988, Petitioner shall secure loan funding.
 - F. By August 1, 1988, Petitioner shall commence construction of upgrading the facilities.
 - G. By August 1, 1989, Petitioner shall complete facility construction and rehabilitation sufficient to allow the facilities to operate in compliance with what.

3. Should Petitioner fail to receive FmHA loan assistance by July 1, 1988, then Petitioner shall comply with the following adjustment in the schedule as stated in Paragraph 2 above:

By November 1, 1989, Petitioner shall complete construction and rehabilitation.

4. Petitioner shall submit monthly progress reports to the Agency at the following addresses:

Illinois Environmental Protection Agency
Division of Water Pollution Control
Compliance Assurance Section
2200 Churchill Road
Post Office Box 19276
Springfield, Illinois 62794-9276

and

Illinois Environmental Protection Agency
Division of Water Pollution Control - Region #1
4302 North Main Street
Rockford, Illinois 61103

Progress reports shall be due the 15th of the following month and, after purchase of the facilities, may be submitted with the facilities' DMRs.

- 5) Within 45 days of the date of this Order, Petitioner shall execute and forward to Thomas Davis, Enforcement Programs, Illinois Environmental Protection Agency, 2200 Churchill Road, Springfield, Illinois 62794-9276, a Certification of Acceptance and Agreement to be bound to all terms and conditions of this variance. The 45-day period shall be held in abeyance during any period that this matter is being appealed. The form of said Certification shall be as follows:

CERTIFICATION

I, (We), _____, having read the Order of the Illinois Pollution Control Board, in PCB 87-56, dated January 21, 1988, understand and accept the said Order, realizing that such acceptance renders all terms and conditions thereto binding and enforceable.

Petitioner

By: Authorized Agent

Title

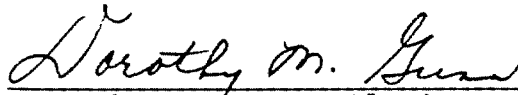
Date

Failure to execute and forward the Certificate within 45 days renders this variance void and of no force and effect as a shield against enforcement of rules from which variance was granted.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1985 ch. 111 1/2 par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 21st day of January, 1988, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board